

The Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Ronald D. Nielsen, through his counsel, T. Jeffrey Keane and the Keane Law Offices, for Amended Complaint against defendants alleges as follows:

PARTIES

1. Plaintiff Ronald D. Nielsen, M.D. is and was at all relevant times a resident of Tacoma, Washington. From May 4, 2005 until May 21, 2010, Dr. Nielsen was employed as a Hospice and Palliative Medicine Physician by defendant Franciscan Health System (“FHS”).

1 2. Defendant FHS is a nonprofit corporation incorporated under the laws of
2 Washington, with its principal place of business in Tacoma, Washington. Dr. Nielsen worked
3 at Franciscan Hospital, a community hospital operated by FHS in Federal Way. FHS is
4 affiliated with defendant Catholic Health Initiatives.

5 3. Defendant Catholic Health Initiatives (“CHI”) is a nonprofit corporation
6 incorporated under the laws of Colorado, with its principal place of business believed to be in
7 Englewood, Colorado. CHI provided a Long-Term Disability (LTD) benefits plan to its
8 employees and to employees of its affiliated organizations, including FHS. FHS operates
9 hospitals and medical clinics in King County and Pierce County, Washington. CHI is and
10 was at all times material to this complaint the Plan Administrator for this LTD Plan. The
11 LTD Plan was funded through an insurance policy (“the policy” or “the LTD policy”) issued
12 by Defendant Unum Life Insurance Company of America (“Unum Life”). Dr. Nielsen was a
13 participant in this LTD plan and a beneficiary of the policy. CHI also sponsored a Short-
14 Term Disability (STD) program known as the Catholic Health Initiatives Salary Continuation
15 Program (“STD Program”). Through this STD Program, CHI provided STD benefits to its
16 employees and to employees of its affiliated organizations, including FHS. CHI was the
17 Program Administrator for its STD Program. Dr. Nielsen was a participant in the STD
18 program. CHI had the responsibility for paying benefits to which participants were entitled
19 under the STD program.

20 4. Defendant Catholic Health Initiatives Plan (“the LTD Plan”) is an employee
21 welfare benefit plan established to provide LTD benefits to employees of CHI and affiliated
22 organizations such as FHS. Dr. Nielsen was a participant in the LTD Plan.

1 5. Defendant Unum Life Insurance Company of America (“Unum Life”) is
2 incorporated in the State of Maine and has its principal place of business in Portland, Maine.
3 Unum Life is a wholly-owned subsidiary of Unum Group Corporation. The LTD Plan was
4 funded by insurance issued by Unum Life under policy number 120265-114. As the insurer
5 of the LTD Plan, Unum Life was and is obligated to pay benefits to which participants are
6 entitled under the LTD Plan.

7 6. CHI and the LTD Plan delegated to Unum Life and Unum Group (described
8 below) the authority and responsibility for making benefit determinations under the LTD
9 Plan. Unum Life and Unum Group made benefits determinations under the LTD Plan. In
10 other words, Unum Life and Unum Group decided whether any given claim would be paid,
11 the amount of the payments, and the duration of the payments. Unum Life and Unum Group
12 continue to perform this function. Unum Life and Unum Group made the benefit decisions
13 denying Dr. Nielsen’s claim for LTD benefits. The STD Program identified “Unum” as the
14 Claims Administrator for that program. Both the initial denial of Dr. Nielsen’s STD claim
15 and the denial of his appeal concerning the STD claim were described in letters bearing the
16 “Unum” letterhead and the explanation that “Unum is a registered trademark and marketing
17 brand of Unum Group and its insuring subsidiaries.” Thus, Unum Life, as one of Unum’s
18 Group’s insuring subsidiaries, made or participated in these decisions.

20 7. Defendant Unum Group Corporation (“Unum Group”) is incorporated in the
21 State of Delaware and has its principal place of business in Chattanooga, Tennessee. Unum
22 Group is the largest disability insurer in the world. As noted above, CHI and the LTD Plan
23 delegated to Unum Group (along with Unum Life) the authority and responsibility for making
24 benefit determinations under the LTD Plan. Along with Unum Life, Unum Group in fact

1 made those determinations, including the decisions to deny Dr. Nielsen's claim for LTD
2 benefits. The STD Program identified "Unum" as the Claims Administrator for that program.
3 Both the initial denial of Dr. Nielsen's STD claim and the denial of his appeal concerning the
4 STD claim were described in letters bearing the "Unum" letterhead and the explanation that
5 "Unum is a registered trademark and marketing brand of Unum Group and its insuring
6 subsidiaries." Thus, Unum Group made or participated in these decisions.
7

JURISDICTION AND VENUE

8. Unum Life is authorized by the Washington Insurance Commissioner to sell,
9 and does sell, insurance in Washington. Unum Life transacts a substantial amount of
10 business within the State of Washington and has had continuous and systematic general
11 business contacts with Washington for many years. Unum Life has appointed large numbers
12 of agents and agencies in the State of Washington to sell insurance on its behalf. Pursuant to
13 RCW 48.05.200, Unum Life has appointed the Washington Insurance Commissioner as its
14 agent for service of process in causes of action arising within Washington. In addition, Unum
15 Life issued the LTD policy that funded the LTD Plan. That policy, in turn, covered hundreds
16 of employees of FHS who lived and worked in the State of Washington, including King
17 County. In addition, Unum Life made the decisions, described more fully below, to deny Dr.
18 Nielsen's claim for LTD benefits and to deny his appeal. This Court has jurisdiction over the
19 person of Unum Life. Unum Life transacts a substantial part of its usual and ordinary
20 business in King County, Washington and did so at all times material to this action. Unum
21 Life also has offices in King County for transaction of business. Venue is proper in this
22 Court.
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1 9. Through its wholly owned subsidiary Unum Life, Unum Group transacts a
2 substantial amount of business within the State of Washington, has had continuous and
3 systematic general business contacts with Washington for many years, and has appointed
4 large numbers of agents and agencies in the State of Washington to sell insurance on its
5 behalf. In addition, Unum Group made the decisions, described more fully below, to deny Dr.
6 Nielsen's claim for LTD benefits and to deny his appeal. Both of these decisions concerning
7 the LTD claim were described in letters bearing the "Unum" letterhead and the explanation
8 that "Unum is a registered trademark and marketing brand of Unum Group and its insuring
9 subsidiaries." Unum Group also made, and continues to make, decisions about eligibility for
10 benefits under the LTD plan affecting hundreds of employees of FHS living and working in
11 the State of Washington, including King County. In addition, Unum Group was the Claim
12 Administrator for the STD Program. Unum Group also made the decisions, described more
13 fully below, to deny Dr. Nielsen's claim for STD benefits and to deny his appeal for those
14 benefits. Both of these decisions concerning the STD claim were described in letters bearing
15 the "Unum" letterhead and the explanation that "Unum is a registered trademark and
16 marketing brand of Unum Group and its insuring subsidiaries." Unum Group transacts a
17 substantial part of its usual and ordinary business in King County, Washington and did so at
18 all times material to this action. Unum Group also has offices in King County for transaction
19 of business. This Court has jurisdiction over the person of Unum Group.
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21 10. The LTD Plan covered and continues to cover hundreds of employees of FHS
22 living and working in the State of Washington, including King County. The LTD Plan
23 transacts a substantial amount of business within the State of Washington and has had
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1 continuous and systematic general business contacts with Washington for many years. This
2 Court has jurisdiction over the person of the LTD Plan.

3 11. CHI contracted with Unum Life for Unum to provide insurance for hundreds
4 of employees of FHS living and working in the State of Washington, including King County.
5 CHI was the Plan Administrator for the LTD Plan at the time that Dr. Nielsen's claim for
6 LTD benefits was denied. CHI continues to be the Plan Administrator for the LTD Plan. As
7 the Administrator of the LTD Plan, CHI takes actions that affect hundreds of employees of
8 FHS living and working in the State of Washington, including King County. Through its
9 affiliate FHS, CHI operates multiple medical facilities in the State of Washington. CHI
10 transacts a substantial amount of business within the State of Washington and has had
11 continuous and systematic general business contacts with Washington for many years. CHI
12 was also the Program Administrator for the CHI Salary Continuation Program (STD benefits).
13 As the Program Administrator of the CHI Salary Continuation Program (STD benefits), CHI
14 took actions that affected hundreds of employees of FHS living and working in the State of
15 Washington. This Court has jurisdiction over the person of CHI.

17 12. Defendant FHS is Washington nonprofit corporation and has its principal place
18 of business in Washington. FHS operates multiple medical facilities in King County,
19 Washington and transacts a substantial part of its usual and ordinary business in King County,
20 and did so at all times material to this action. This Court has jurisdiction over the person of
21 FHS. Venue is proper in this Court.

23 13. Dr. Nielsen originally filed this action in the Superior Court of Washington for
24 King County. Unum Life and Unum Group removed the action to this Court on federal
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1 question grounds, contending that the Employee Retirement Income Security Act (“ERISA”),
2 29 USC § 1001 et seq., governs this case.

3 **ERISA DOES NOT APPLY**

4 14. CHI is, and was at all times material to this complaint, a religious organization
5 associated with the Catholic Church.

6 15. The organization that is now FHS was founded by the Sisters of St. Francis of
7 Philadelphia, a religious organization associated with the Catholic Church. FHS is, and was
8 at all times material to this complaint, a religious organization associated with the Catholic
9 Church.

10 16. The LTD Plan and the STD Program are both “church plans” within the
11 meaning of 29 USC § 1002(33). ERISA generally does not apply to church plans. 29 USC §
12 1003(b)(2). Unum Life and Unum Group (collectively designated as “Unum” hereinafter
13 unless otherwise indicated) have admitted in correspondence to Dr. Nielsen’s counsel that Dr.
14 Nielsen’s claims are not governed by ERISA. Because CHI and the LTD Plan delegated
15 authority to Unum to make benefits determinations under the LTD Plan, and because Unum
16 was acting within the course of that authority in determining Dr. Nielsen’s benefits and in
17 determining that ERISA does not apply to his claim, Unum was the agent of CHI and the
18 LTD Plan in doing so. CHI and the LTD Plan are therefore bound by Unum’s admission
19 under the rule that an agent acting within the scope of its agency may bind the principal.
20 Because CHI delegated authority to Unum to make benefits determinations under the Salary
21 Continuation Program (STD), and because Unum was acting within the course of that
22 authority in determining Dr. Nielsen’s benefits and in determining that ERISA does not apply
23 to his STD claim, Unum was the agent of CHI in doing so. CHI is therefore bound by Unum’s
24 admission under the rule that an agent acting within the scope of its agency may bind the
25 principal.

17. CHI did not properly elect to have either the LTD Plan or the STD Program treated as being subject to ERISA.

THE TERMINATION OF DR. NIELSEN'S EMPLOYMENT BY FHS, HIS INABILITY TO WORK SINCE THAT TIME, AND HIS HISTORY OF DIFFICULTIES IN THE WORKPLACE DUE TO HIS ILLNESSES

18. From May 4, 2005 until May 21, 2010, Plaintiff was employed as a Hospice and Palliative Medicine Physician by FHS. Dr. Nielsen worked at St. Francis Hospital, a community hospital operated by FHS in Federal Way. On May 21, 2010, FHS fired Dr. Nielsen from his job. He was fired for difficulties with attention, concentration, and working memory, and for inability to follow through in a timely manner. He was 55 years old at the time he was fired.

19. With extremely limited exceptions of very short duration, Dr. Nielsen has been continuously unable to find any gainful employment as a physician since the termination of his employment by FHS on May 21, 2010.

20. Before he began working for FHS in 2005, Dr. Nielsen had had difficulty meeting the performance standards in other jobs where he worked as a physician. For example, after working for a small private medical practice in Brewster, Washington for about three years, Dr. Nielsen was asked to leave. His wife, who is also a physician, worked in the same practice but was asked to stay. It was only due to her assistance that he was able to maintain his employment there for as long as he did. When Dr. Nielsen left that practice in Brewster after being asked to leave, his wife voluntarily left also. The two of them opened their own practice in Brewster, which they operated from 1996 to 2000. During this time, Dr. Nielsen's wife helped him considerably with organizational and administrative matters and helped to provide a highly structured environment for his work. In the period between 2000 and 2005, Dr. Nielsen worked in three different jobs, holding each one for only a relatively

1 short time. His employment in at least one of these three jobs was involuntarily terminated.
2 Dr. Nielsen's difficulty in holding a job during the years before 2005 was due to the same
3 problems with attention, focus, concentration, organization, working memory, anxiety, slow
4 processing, sequencing, understanding priorities, and inability to pick up on social cues that
5 caused him to lose his job at FHS.

6 **UNUM'S DENIAL OF DR. NIELSEN'S CLAIM FOR STD BENEFITS**

7 21. Dr. Nielsen was covered by the STD Program. In June 2010 Dr. Nielsen
8 submitted a claim for STD benefits to Unum.
9

10 22. The STD program defined "disabled" as follows:

11 You are disabled when Unum determines that:

12 - you are **limited** from performing the **material and substantial duties** of
13 your **regular occupation** due to your **sickness or injury**; and
14 - you have a 20% or more loss in **weekly earnings** due to that same sickness or
15 injury.

16 23. The STD program defined "**LIMITED**" as "what you cannot or are unable to
17 do."

18 24. The STD program defined "**MATERIAL AND SUBSTANTIAL DUTIES**"
19 in pertinent part as

20 duties that:

21 - are normally required for the performance of your regular occupation; and
22 - cannot be reasonably omitted or modified.

23 25. The STD program defined "**REGULAR OCCUPATION**" as

24 the occupation you are routinely performing when your disability begins.
25 Unum will look at your occupation as it is normally performed in the national
economy, instead of how the work tasks are performed for a specific employer
or at a specific location.

26 At the time Dr. Nielsen's disability began, his "regular occupation" was Hospice and
27 Palliative Medicine Physician.

1 26. The STD program defined “**SICKNESS**” as “an illness or disease.”
2 27. Under the STD program, beginning 7 days after the commencement of his
3 disability, Dr. Nielsen was entitled to be paid his full salary as long as he met the definition of
4 “disabled,” for a period of 90 days. It is undisputed that Dr. Nielsen was unable to find work
5 during that period.

6 28. On June 11, 2010, Dr Nielsen’s treating psychiatrist, Dr. Debra Hughes, filled
7 out a Unum disability claim form. Dr. Hughes concluded that the “primary diagnosis
8 preventing the patient from working,” was Adult Attention Deficit Disorder. She checked
9 “yes” in answer to the question “Are there any cognitive deficits or psychiatric conditions that
10 impact function?” She described Dr. Nielsen’s restrictions and limitations as “poor attention,
11 poor concentration, poor working memory, problems with organization and follow through,
12 forgetful.” Dr. Hughes concluded that these limitations resulted in the loss of Dr. Nielsen’s
13 job. The form asked Dr. Hughes to note the patient’s Axis V level as described in the DSM
14 IV. The DSM IV is a reference to the "Diagnostic and Statistical Manual of Mental
15 Disorders," 4th ed., published by the American Psychiatric Association. According to the
16 DSM IV, Axis V measures the patient’s “Global Assessment Functioning” level. This is a
17 100-point scale that the mental health professional uses to describe the patient’s overall level
18 of psychological, social, and occupational functioning. On this 100-point scale, Dr. Hughes
19 rated Dr. Nielsen at “45-50 (job loss).” According to the DSM IV, a person with a GAF
20 rating of anywhere from 41 to 50 has “serious symptoms (e.g., suicidal ideation, severe
21 obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational,
22 or school functioning (e.g., no friends, unable to keep a job)” (emphasis added). In other
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1 words, in Dr. Hughes' opinion, Dr. Nielsen's Attention Deficit Disorder was a serious
2 impairment that rendered him unable to keep a job.

3 29. Dr. Hughes filled out another Unum disability claim form on June 12, 2010.
4 In addition to repeating some of her statements from the June 11, 2010 form, Dr. Hughes
5 identified the "other conditions that prevent the patient from working" as "anxiety,
6 depression, social awareness deficits." Dr. Hughes's secondary diagnoses were "major
7 depressive disorder recurrent moderate" and "Generalized Anxiety Disorder." Again, Dr.
8 Hughes checked "yes" in answer to the question "Are there any cognitive deficits or
9 psychiatric conditions that impact function?" She described Dr. Nielsen's restrictions and
10 limitations as "severe difficulties with attention, focus, concentration, organization, working
11 memory, hyper____at times, anxiety, misses priorities and social cues from others, slow
12 processing [and] prob[lems]s sequencing." Dr. Hughes noted that these restrictions and
13 limitations were the reason for his recent job loss and had been a lifelong problem for Dr.
14 Nielsen. Dr. Hughes further noted that Dr. Nielsen's recent loss of his job was yet another job
15 failure and that he had failed repeatedly in various medical settings not through lack of
16 intelligence but due to problems with organization and administration. Dr. Hughes added that
17 Dr. Nielsen was "weak with complex processing skills and attention," that his "reading
18 performance is lower and slower," that his "ability to organize himself is impaired," that
19 "social cues are not often picked up so he frequently has trouble adjusting behavior
20 accordingly," and that "he is truly mystified by what has happened."

23 30. Nevertheless, Unum denied Dr. Nielsen's STD claim in a letter dated June 25,
24 2010. It was undisputed that Dr. Nielsen had not worked since May 21, 2010, and that he had
25 no earnings during that time. Unum denied the claim because "you did not stop working

1 because you were instructed to do so by a medical professional.” Unum ignored Dr. Hughes’s
2 diagnoses and her conclusion that Dr. Nielsen’s severe difficulties with attention, focus,
3 concentration, organization, sequencing, working memory, anxiety, understanding priorities,
4 picking up on social cues from others, and his weak processing skills were precisely what had
5 caused him to be fired from his most recent job and were what had caused him to lose other
6 jobs in the past.

7
8 31. Dr. Nielsen appealed Unum’s denial of his claim for STD benefits. On June
9 27, 2011 Unum denied his appeal. Unum concluded that Dr. Nielsen did “not have any
10 restrictions and limitations that would prevent him from working at the time that he cease
11 [sic] work.” Again, Unum relied on the nonsensical notion that Dr. Nielsen was disabled only
12 if his physician advised him to cease work. There was no such requirement in the language of
13 the STD Program. Instead, the STD Program’s definition of “disabled” was simply that the
14 claimant simply be unable to perform the duties that were normally required for his regular
15 occupation.

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17 32. In denying the STD appeal, Unum simply ignored or summarily dismissed the
18 conclusions of Dr. Hughes, as described in the June 11 and June 12, 2010 statements she had
19 submitted.

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21 33. In denying the STD appeal, Unum did not contend that Dr. Hughes’s diagnoses
22 of Adult Attention Deficit Disorder, Major Depressive Disorder, and Anxiety Disorder were
23 incorrect. Unum offered no specific evidence to refute Dr. Hughes’s conclusion that Adult
24 Attention Deficit Disorder was preventing the patient from working. Unum offered no
25 specific evidence to refute Dr. Hughes’ conclusion that “other conditions that prevent the
patient from working” were “anxiety, depression, social awareness deficits.”

1 34. In denying the STD appeal, Unum made reference to a neuropsychological
2 evaluation of Dr. Nielsen performed in June 2010 by Dr. David Fordyce. Unum ignored Dr.
3 Fordyce's conclusion that Dr. Nielsen's neuropsychological test results were consistent with
4 Attention Deficit Disorder – Inattentive Type and a Mood Disorder with anxious and
5 depressed features. Unum ignored Dr. Fordyce's conclusion that:

6 "[H]e would have the best chance of vocational success in [sic] settings that are relatively
7 even paced, structured, and perhaps more linear in nature. He will likely function better in
8 settings with minimal distractions or interruptions, a state of affairs that would be difficult [to]
9 obtain in standard clinical environments." Unum also ignored the following conclusions
10 expressed by Dr. Fordyce on June 14:

12 I believe he does possess some impairment in information processing (complex
13 attention and processing speed) that are subtle and hard to measure on
14 neuropsychological testing – though there certainly is an indication of their
15 presence. He also appears to struggle with social intelligence in a way that
16 likely has also compromised his vocational function. Finally, general mood is
17 anxious and at least mildly depressed. These impairments have likely been
18 longstanding, and it sounds like they have impacted in some way virtually
19 every medical environment he has worked in. He clearly has failed at several
20 positions he has worked in, including the most recent. . . . Diagnostically, the
21 history and test results are most consistent with Attention Deficit Disorder –
22 Inattentive Type and a Mood Disorder with anxious and depressed features.

23 I believe that he should complete his application for long-term disability
24 income. At the same time, I think he should continue to look for work – but
25 only in a setting that could accommodate his impairments. It will be a
challenge to locate a good employment fit. . . . If he is going to have any
chance of successful work, it will need to be in a setting that is inherently
structured and organized, or provides some accommodation that helps with the
difficulties in attention, organization, and effective management of the
administrative structure.

23 35. After Unum denied the appeal of his STD claim, Dr. Nielsen continued to
24 provide Unum with additional information establishing that he was in fact disabled during the
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1 period for which STD benefits were payable. Up to the time of the filing of this complaint,
2 however, Unum has continued to deny that Dr. Nielsen is entitled to any STD benefits.

3 **UNUM'S DENIAL OF DR. NIELSEN'S CLAIM FOR LTD BENEFITS**

4 36. Dr. Nielsen was covered by the LTD Plan.

5 37. The insurance policy ("policy" or "LTD policy") issued by Unum Life
6 pursuant to the LTD Plan defined "disabled" as follows:

7 You are disabled when Unum determines that:

8 - you are **limited** from performing the **material and substantial duties** of
9 your **regular occupation** due to your **sickness or injury**; and
10 - you have a 20% or more loss in your **indexed monthly earnings** due to the
same sickness or injury.

11 . . .

12 You must be under the regular care of a physician to be considered disabled.

13 Since May 21, 2010, Dr. Nielsen has continuously had a 20% or more loss in his "indexed
14 monthly earnings," as that term is defined in the policy. Since May 21, 2010, Dr. Nielsen has
been continuously under the regular care of a physician.

15 38. The policy defined "**LIMITED**" as "what you cannot or are unable to do."

16 39. The policy defined "**MATERIAL AND SUBSTANTIAL DUTIES**" as
17 duties that:

18 - are normally required for the performance of your regular occupation; and
- cannot be reasonably omitted or modified.

19 40. The policy defined "**REGULAR OCCUPATION**" as

20 the occupation you are routinely performing when your disability begins.
21 Unum will look at your occupation as it is normally performed in the national
22 economy, instead of how the work tasks are performed for a specific employer
or at a specific location.

23 At the time Dr. Nielsen's disability began, his "regular occupation" was Hospice and
24 Palliative Medicine Physician.

25 41. The policy defined "**SICKNESS**" as

1 an illness or disease. Disability must begin while you are covered under the
2 plan.”

3 42. Dr. Nielsen filed a claim for LTD benefits under the LTD Plan. In a letter
4 dated April 20, 2012, Unum denied that claim. As it did in denying Dr. Nielsen’s STD claim,
5 Unum concluded that Dr. Nielsen was not disabled under the LTD policy because his medical
6 care providers had not advised him to leave work. Again, however, nothing in the LTD
7 policy’s definition of “disabled” required that a claimant’s care providers tell him not to work.
8 The relevant question is whether, due to an illness, the claimant is unable to perform the
9 duties normally required for the performance of his regular occupation claimant. Unum also
10 based its decision on the fact that Dr. Nielsen had attempted to find work as a physician.
11 Nothing in the policy states that a claimant cannot be considered disabled if he is seeking to
12 find work in his occupation.

13 43. Unum also denied Dr. Nielsen’s LTD claim because the State had taken no
14 action against his medical license. The suggestion was that a physician is not disabled as long
15 as the State in which he or she practices has taken no action against his or her medical license.
16 There is nothing in the LTD policy’s definition of “disabled” to support this position.

17 44. Unum acknowledged the opinion of Dr. Nielsen’s treating psychiatrist, Dr.
18 Debra Hughes, that Dr. Nielsen was unable to perform the duties of a physician due to his
19 psychiatric impairment. But Unum dismissed this opinion entirely. Its reasoning for
20 dismissing Dr. Hughes’ was as follows: “Dr. Hughes noted you always performed well with
21 clinical work and that absent administrative duties such as time constraints and paperwork,
22 you are able to care for patients and their families in a very therapeutic fashion.” The issue is
23 not whether Dr. Nielsen was a threat to the safety of patients with whom he was able to spend
24 large amounts of time. The issue was, and is, whether Dr. Nielsen’s psychiatric condition

1 rendered him unable to perform the duties normally required for the performance of his
2 regular occupation. Unum's position would make sense only if administrative duties, time
3 constraints, and paperwork were not part of the duties normally required of a physician in a
4 modern medical practice. But dealing with administrative responsibilities, dealing
5 successfully with time constraints, and completing paperwork *are* duties normally required of
6 a physician in a modern medical practice. Unum cited no evidence suggesting otherwise.
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8 45. In denying Dr. Nielsen's claim, Unum relied on a comment by Dr. Nielsen's
9 psychotherapist, Dr. Brad Bates, that while Dr. Nielsen had limitations as a physician, he was
10 not unfit for duty as a doctor. Unum's reliance on this observation is yet another example of
11 its faulty logic and unreasonable conclusion. The premise for Unum's denial of Dr. Nielsen's
12 claim was that as long as a physician is not so cognitively or psychologically impaired as to
13 be totally unfit to act as a physician in any setting, then the physician is not disabled. But
14 again, that premise is not supported by the LTD policy's definition of "disabled." If given
15 unlimited amounts of time to spend with each patient, if not required to remember information
16 about multiple patients, if not required to complete chart notes concerning multiple patients in
17 a short time frame, if not required to respond appropriately and in a timely fashion to
18 colleagues and other staff members, if not required to remember to bring his pager to the
19 hospital, if not required to show up on time, if not required to perform other routine
20 administrative duties, and if not required to demonstrate an excellent working memory and an
21 ability to screen out distractions, a physician like Dr. Nielsen may indeed be "fit" to practice
22 medicine in the sense of appropriately diagnosing and treating an extremely limited number of
23 patients. But the ability to perform all of these duties is normally required of every physician
24 in every modern medical facility. Moreover, Dr. Bates diagnosed Dr. Nielsen as suffering
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1 from Attention-Deficit/Hyperactivity Disorder, Primarily Inattentive Type, as well as
2 Dysthymic Disorder (an overwhelming, chronic state of depression), acknowledged that Dr.
3 Nielsen can become flustered in situations like morning rounds that require rapid information
4 processing, and recognized that Dr. Nielsen's cognitive and psychological impairments
5 limited his abilities as a physician.

6 46. In denying Dr. Nielsen's LTD claim, Unum also claimed that a
7 neuropsychological evaluation conducted by Dr. David Fordyce in June 2010 did not support
8 the conclusion that Dr. Nielsen was disabled. Dr. Nielsen was referred to Dr. Fordyce for
9 evaluation by the Washington Physicians' Health Program (WPHP). FHS – Dr. Nielsen's
10 employer until May 21, 2010 -- referred Dr. Nielsen to WPHP. WPHP, in turn, sent Dr.
11 Nielsen to Dr. Fordyce for evaluation.

12 47. As Unum acknowledged, Dr. Fordyce concluded that Dr. Nielsen's
13 neuropsychological test results were consistent with Attention Deficit Disorder – Inattentive
14 Type and a Mood Disorder with anxious and depressed features. As Unum also
15 acknowledged, Dr. Nielsen's performance on more complex measures of processing speed,
16 attention, and reading comprehension ranged from below average to average. Dr. Fordyce
17 concluded his initial June 7, 2010 report by saying:
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19 [H]e would have the best chance of vocational success is [sic] settings that are
20 relatively even paced, structured, and perhaps more linear in nature. He will
21 likely function better in settings with minimal distractions or interruptions, a
22 state of affairs that would be difficult [to] obtain in standard clinical
23 environments.

24 48. On a June 14, 2010 report, which was in Unum's file at the time it denied Dr.
25 Nielsen's LTD claim, Dr. Fordyce wrote:

I believe he does possess some impairment in information processing (complex
attention and processing speed) that are subtle and hard to measure on

1 neuropsychological testing – though there certainly is an indication of their
2 presence. He also appears to struggle with social intelligence in a way that
3 likely has also compromised his vocational function. Finally, general mood is
4 anxious and at least mildly depressed. These impairments have likely been
5 longstanding, and it sounds like they have impacted in some way virtually
6 every medical environment he has worked in. He clearly has failed at several
7 positions he has worked in, including the most recent. . . . Diagnostically, the
8 history and test results are most consistent with Attention Deficit Disorder –
9 Inattentive Type and a Mood Disorder with anxious and depressed features.
10

11 I believe that he should complete his application for long-term disability
12 income. At the same time, I think he should continue to look for work – but
13 only in a setting that could accommodate his impairments. It will be a
14 challenge to locate a good employment fit. . . . If he is going to have any
15 chance of successful work, it will need to be in a setting that is inherently
16 structured and organized, or provides some accommodation that helps with the
17 difficulties in attention, organization, and effective management of the
18 administrative structure.

19 Dr. Nielsen's inability to maintain a job as a physician is not due to a lack of natural
20 intelligence. Indeed, Dr. Fordyce found that on one measure of intelligence Dr. Nielsen was
21 in the 93rd percentile and on another measure was in the 95th percentile.
22

23 49. In addition, Dr. Fordyce completed a Unum disability claim form on
24 November 15, 2011. This form was in Unum's file at the time it denied Dr. Nielsen's LTD
25 claim. In the claim form he completed on November 15, 2011, Dr. Fordyce stated that the
“primary diagnosis preventing the patient from working,” was “ADHD [Attention-
Deficit/Hyperactivity Disorder], Mood Disorder with anxiety & depression.” His secondary
diagnosis was “poor social awareness, poor self-esteem.” Dr. Fordyce checked “yes” in
answer to the question “Are there any cognitive deficits or psychiatric conditions that impact
function?” Asked to identify the “diagnostic or clinical findings [that] support your
diagnosis,” Dr. Fordyce wrote: “work history, neuropsychological evaluation results.”

26 50. The Unum claim form asked Dr. Fordyce to note the patient's Axis V level as
27 described in the DSM IV. On the 100-point Global Assessment Functioning scale used to
28

1 describe the patient's overall level of psychological, social, and occupational functioning, Dr.
2 Fordyce rated Dr. Nielsen at 50. Again, according to the DSM IV, a person with a GAF
3 rating of anywhere from 41 to 50 has "serious symptoms (e.g., suicidal ideation, severe
4 obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational,
5 or school functioning (e.g., no friends, unable to keep a job)" (emphasis added).

6 51. In the November 15, 2011 claim form, Dr. Fordyce described Dr. Nielsen's
7 restrictions and limitations as "He would require a supported & structured working setting to
8 succeed." Dr. Fordyce concluded by saying:
9

10 Dr. Nielsen would likely be able to work as a physician only in a highly
11 organized & supported work environment. He has not been able to attend to,
remember, and follow the normal structure of the medical environments he has
12 worked in.

13 Asked to state when he expected improvement in the patient's functional capacity, Dr.
14 Fordyce supplied no answer.

15 52. In summary, Dr. Fordyce concluded:

16 - that Dr. Nielsen suffered from Attention Deficit Disorder – Inattentive Type and a
17 Mood Disorder with anxious and depressed features, and that these disorders were
18 preventing him from working;

19 - that as a result of these conditions Dr. Nielsen's overall level of functioning was at a
20 level indicating a serious impairment in occupational functioning;

21 - that Dr. Nielsen's performance on more complex measures of processing speed,
22 attention, and reading comprehension ranged from below average to average, and that
23 his information processing was impaired;

24 - that Dr. Nielsen's impaired social intelligence had likely compromised his vocational
25 function;

1 - that all of these disorders and impairments had likely impacted virtually every
2 medical environment in which Dr. Nielsen had worked, and that Dr. Nielsen had not
3 been able to attend to, remember, and follow the normal structure of the medical
4 environments in which he had worked;

5 - that Dr. Nielsen's only chance of maintaining employment as a physician would be
6 in a setting that presents minimal distractions or interruptions and that is inherently
7 structured and organized, or provides some accommodation that helps with his
8 difficulties in attention, organization, and effective management of the administrative
9 structure; and

10 - that such a setting would be difficult to find in standard clinical environments.

11 53. Nevertheless, in its April 20, 2012 denial of Dr. Nielsen's LTD claim, Unum
12 concluded that Dr. Nielsen had neither "cognitive deficits or a behavioral health condition that
13 would preclude you from performing the material and substantial duties of your own
14 occupation." Ignoring or dismissing the conclusions of Dr. Hughes and Dr. Fordyce, Unum
15 instead chose to base its decision on the opinions of Unum's "onsite physicians" – i.e.,
16 physicians on Unum's payroll who never met or tested Dr. Nielsen. In the opinion of these
17 "onsite physicians," the information they reviewed did not support the conclusion "that you
18 ceased work and remained out of work as the result of impairing psychiatric illness."

19 54. In a letter dated March 18, 2013, Unum denied Dr. Nielsen's appeal of Unum's
20 initial decision on his LTD claim.

21 55. Unum's rejection of the LTD appeal denial did not even mention the findings
22 of Dr. Debra Hughes, Dr. Nielsen's treating psychiatrist in 2010. In June 2010, Dr. Hughes:

1 - determined that the “primary diagnosis prevent[ing] the patient from working,” was
2 Adult Attention Deficit Disorder;

3 - observed that there were cognitive deficits or psychiatric conditions that impacted
4 Dr. Nielsen’s function;

5 - noted that Dr. Nielsen’s restrictions and limitations were “severe difficulties with
6 attention, focus, concentration, organization, working memory, hyper____at times,
7 anxiety, misses priorities and social cues from others, slow processing [and]
8 prob[lems]s sequencing”;

9 - concluded that these limitations resulted in the loss of Dr. Nielsen’s job;

10 - on the 100-point Global Assessment Functioning scale, rated Dr. Nielsen’s
11 functioning at “45-50 (job loss)”, meaning that he had a serious impairment in
12 occupational functioning; and

13 - observed that “other conditions that prevent the patient from working” were
14 “anxiety, depression, social awareness deficits.”

16 56. Unum’s denial of Dr. Nielsen’s appeal mentioned Dr. Fordyce’s June 2010
17 evaluation and acknowledged Dr. Fordyce’s diagnosis of Attention Deficit Disorder –
18 Inattentive Type and a Mood Disorder with anxious and depressed features. But Unum
19 completely ignored all of Dr. Fordyce’s conclusions as described in paragraphs 45 through 50
20 above.

22 57. In denying the LTD appeal, Unum claimed that Dr. Nielsen’s “history” did not
23 support the diagnosis of attention deficit disorder because what Dr. Nielsen reported to
24 various medical professionals over the last few years did not refer to behaviors often seen in
25 children impaired with attention deficit disorder. In other words, Unum concluded that Dr.

1 Nielsen has not suffered from attention deficit disorder in the years 2010-2013 simply because
2 Dr. Nielsen himself did not say that he displayed symptoms of the disorder as a child. This is
3 ludicrous. The earliest record of any psychological or psychiatric evaluation of Dr. Nielsen is
4 from the year 2003. There are no records of any such evaluations having occurred during his
5 childhood or indeed at any time before age 48. The fact that Dr. Nielsen did not, in his recent
6 discussions with his care providers, report having symptoms of ADD when he was a child
7 does not mean that he had no such symptoms in his childhood. More importantly, the
8 majority of the psychological or psychiatric professionals who have evaluated Dr. Nielsen
9 over the last several years have indeed diagnosed him with ADD.
10

11 58. In denying the appeal, Unum also contended that because Dr. Nielsen had been
12 looking for work in the period since his employment was terminated in May 2010, this meant
13 that he had no functional impairment. In other words, Unum concluded that because Dr.
14 Nielsen *thought* he might be able to get work as a physician and tried to obtain such work, it
15 necessarily followed that he was capable of getting and holding a job in his occupation. By
16 using this conclusion to support its denial of Dr. Nielsen's appeal, Unum was effectively
17 punishing Dr. Nielsen for trying to find work. Moreover, Unum's conclusion flies in the face
18 of the evidence from Dr. Fordyce that Dr. Nielsen's only chance of maintaining employment
19 as a physician would be in a setting that presents minimal distractions or interruptions and that
20 is inherently structured and organized, or provides some accommodation that helps with his
21 difficulties in attention, organization, and effective management of the administrative
22 structure – a setting that Dr. Fordyce said would be difficult to find in standard clinical
23 environments.
24

1 59. In denying the LTD appeal, Unum also relied on selected statements by Dr.
2 Nielsen to some of his medical care providers in late 2011, 2012, or 2013 about how he was
3 feeling at that time. Unum carefully chose a few statements indicating that Dr. Nielsen
4 thought he was doing well and/or feeling well. Unum even sought to justify its denial of the
5 LTD appeal by seizing on alleged statements by Dr. Nielsen in late 2011, 2012, or 2013 to the
6 effect that he was feeling well because of the lack of work pressures and associated stress. By
7 citing these alleged statements, Unum was suggesting that Dr. Nielsen was suddenly “cured”
8 and therefore was fully able to obtain and maintain employment as a physician. These
9 statements in no way establish that Dr. Nielsen had suddenly become capable of consistently
10 demonstrating the high degree of focus, concentration, rapid mental processing, attention,
11 organization, working memory, sequencing, and social perceptiveness necessary to obtain and
12 hold a job as a physician. In addition, these statements made in late 2011, 2012 and 2013
13 have no bearing on the question of whether he was disabled in 2010 and most of 2011.

15 60. In addition, at the time that Unum denied the LTD appeal, Unum knew that the
16 very nature of at least one of Dr. Nielsen’s illnesses deprived him of the ability to understand
17 and measure his own feelings and level of cognitive performance. See discussion below of
18 findings of Dr. Richard Adler. In addition, in a telephone discussion with one of Unum’s on-
19 staff physicians, Dr. Debra Hughes noted that Dr. Nielsen has poor insight into his problems
20 with employers or in interactions with others, and that he typically thinks he is doing fine
21 when in fact he is not. Thus, it was both incorrect and unreasonable for Unum to conclude,
22 based on Dr. Nielsen’s own reports in late 2011, 2012 and 2013 about how he was feeling or
23 doing, that Dr. Nielsen was capable of obtaining and maintaining employment as a physician.
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1 61. In addition to all of the information that was available to Unum when it denied
2 the STD claim and when it initially denied the LTD claim, Unum also had before it when it
3 denied the LTD appeal the October 29, 2012 evaluation prepared by Dr. Richard Adler. Dr.
4 Adler is a Board-Certified Psychiatrist and a Clinical Instructor at the University of
5 Washington Department of Psychiatry and Behavioral Sciences.

6 62. Dr. Adler interviewed Dr. Nielsen, administered a series of psychological tests
7 to him, and reviewed his records.

8 63. Dr. Adler diagnosed Dr. Nielsen as suffering from Anxiety Disorder (with
9 likely Posttraumatic Stress Disorder features -- including dissociative symptoms), Depressive
10 Disorder, and Attention Deficit Disorder. Dissociative experiences are those in which a
11 person may be involved in behavior but not fully recollect what has transpired. On the 100-
12 point Global Assessment Functioning scale used to describe the patient's overall level of
13 psychological, social, and occupational functioning, Dr. Adler rated Dr. Nielsen at 45.

14 64. Dr. Adler concluded that Dr. Nielsen "has one or more psychiatric conditions
15 (as provided above [in his diagnosis]) -- any of which alone and most certainly being present
16 in combination, which materially make him unsuitable to practice Internal Medicine
17 presently."

18 65. Dr. Adler further concluded: "It is unlikely, in my opinion, that any reasonable
19 medical facility would hire Dr. Nielsen to practice Internal medicine if they were made fully
20 aware of his problems understanding his feelings, the feelings of others and his propensity to
21 dissociate."

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1 66. Finally, Dr. Adler concluded: "In the context of the definition of disability
2 provided by UNUM (i.e. 'you are limited from performing material and substantial duties of
3 your regular occupation due to your sickness') it is my opinion that Dr. Nielsen IS disabled."

4 67. With regard to Dr. Nielsen's inability to understand his own feelings and those
5 of others, and propensity to dissociate, Dr. Adler noted that Dr. Nielsen suffered from
6 alexithymia. Alexithymia is the cognitive-affective disturbance that affects the way
7 individuals experience and express their emotions – i.e., a diminished ability to identify and
8 describe one's feelings. As a profound illustration of this problem, Dr. Adler noted that while
9 Dr. Nielsen's responses on some of the psychological tests reflected meaningful symptoms of
10 impairment and distress, Dr. Nielsen at the same time characterized himself as functioning at
11 a level of 80 out of 100 and as having a mood that was a 10 out of 10. Dr. Adler described
12 this contrast as a "stunning example of how seriously 'out of touch' Dr. Nielsen is with his
13 feelings and circumstances." Alexithymia also results in difficulty in distinguishing and
14 interpreting the emotions of others. This is consistent with Dr. Hughes's observation that Dr.
15 Nielsen had social awareness deficits and that he had difficulty picking up on social cues and
16 therefore frequently had trouble adjusting behavior accordingly. Dr. Adler also noted that
17 alexithymia is significantly correlated with dissociative experiences.

18 68. With regard to Dr. Nielsen's attention deficit disorder, Dr. Adler noted that Dr.
19 Nielsen's results on the Conners' Continuous Performance Test-II better matched the clinical
20 profile of persons with ADD than the non-clinical profile from the general population. Dr.
21 Adler also noted that on one of the other tests, the Validity Indicator Profile (VIP) non-verbal
22 subtest, Dr. Nielsen took longer to complete the subtest than any other person Dr. Adler had
23
24

1 ever tested. In addition, as the items in this test became more difficult, there was a prominent
2 and progressive deterioration in Dr. Nielsen's performance.

3 69. At the time it denied Dr. Nielsen's LTD appeal, Unum also had in its file a
4 report from a vocational expert, John Fountaine. Mr. Fountaine holds a Master's Degree in
5 Rehabilitation Counseling and has practiced continuously in the field of rehabilitation
6 counseling and vocational assessment since 1992. Mr. Fountaine interviewed Dr. Nielsen and
7 his wife, reviewed Dr. Nielsen's records, and discussed Dr. Nielsen's case with Dr. Adler.
8 Mr. Fountaine concluded that the reason for Dr. Nielsen's loss of several jobs as a physician
9 was his cognitive, psychological or emotional insufficiencies. In Mr. Fountaine's
10 professional opinion, the kind of structured environment and sheltered work in which Dr.
11 Nielsen might possibly succeed is simply not available. He further concluded that Dr. Nielsen
12 is unemployable as a result of a complicated combination of cognitive, psychological and
13 emotional impairments.

15 **THE UNITED STATES SOCIAL SECURITY ADMINISTRATION HAS FOUND**
16 **THAT DR. NIELSEN HAS BEEN DISABLED SINCE MAY 28, 2010**

17 70. On May 13, 2013, the U.S. Social Security Administration determined under
18 its rules that Dr. Nielsen has been continuously disabled since May 28, 2010. Through
19 counsel, Dr. Nielsen advised Unum of the SSA decision. To be entitled to a Social Security
20 Disability award, the claimant must suffer from an impairment or impairments "of such
21 severity that he is not only unable to do his previous work but cannot, considering his age,
22 education, and work experience, engage in any other kind of substantial gainful work which
23 exists in the national economy, regardless of whether such work exists in the immediate area
24 in which he lives, or whether a specific job vacancy exists for him, or whether he would be
25 hired if he applied for work." 42 U.S.C. § 423(d)(2)(A). This is a far more stringent standard

1 than the standard under which Unum determined that Dr. Nielsen is *not* disabled. Despite
2 being aware of the Social Security Disability award, Unum has not altered its position
3 concerning its denial of LTD or STD benefits.

4 **FIRST CAUSE OF ACTION: BREACH OF CONTRACT AGAINST CHI**
5 **AND FHS – STD BENEFITS**

6 71. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 70, above.

7 72. The CHI STD Program constituted a contract between CHI and FHS's
8 employees covered by the Program. Dr. Nielsen was covered by the STD Program. His labor
9 for FHS – an affiliate of CHI – constituted consideration for CHI's promise to provide
10 benefits under the STD Program.

11 73. In consideration for Dr. Nielsen's promised labor, FHS promised to provide
12 him with benefits under the terms of the STD Program. This exchange of promises
13 constituted a contract.

14 74. Dr. Nielsen performed all of his obligations under the contracts with CHI and
15 FHS.

16 75. Dr. Nielsen qualified for STD benefits under the terms of the STD Program.
17 CHI and FHS breached their contracts with Dr. Nielsen by failing to pay Dr. Nielsen the
18 benefits to which he was entitled under the STD Program.

19 76. Dr. Nielsen incurred damages as a result of the breach of the contract by CHI
20 and FHS. Under the terms of the STD Program, Dr. Nielsen is entitled to recover from CHI
21 and FHS the full amount of his salary over the 90 day period that began 7 days after the date
22 his disability began (May 21, 2010).

SECOND CAUSE OF ACTION: BREACH OF CONTRACT
AGAINST UNUM LIFE AND UNUM GROUP – STD BENEFITS

77. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 76, above.

78. Unum Life and Unum Group (collectively Unum) entered into a contract with CHI to provide administrative claims handling services for the CHI STD Program. CHI paid compensation to Unum for these services. In return, Unum promised to make benefits determinations in accordance with the terms of the STD Program.

79. As a participant in the STD Program, Dr. Nielsen was a third-party beneficiary of the contract between CHI and Unum. Pursuant to the contract between CHI and Unum, Unum owed Dr. Nielsen a contractual duty to decide his claim for benefits in accordance with the terms of the STD Program. Dr. Nielsen performed all of his obligations under the contract between CHI and Unum.

80. Dr. Nielsen qualified for STD benefits under the terms of the STD Program. Unum breached the contract and breached its contractual duty to Dr. Nielsen by denying his claim, denying his appeal, and to this day denying his right to benefits.

81. Dr. Nielsen incurred damages as a result of Unum's breach of its contract with CHI and Unum's breach of its contractual duties to Dr. Nielsen. Under the terms of the STD Program, Dr. Nielsen is entitled to recover from Unum the full amount of his salary over the 90 day period that began 7 days after the date his disability began (May 21, 2010).

**THIRD CAUSE OF ACTION: BREACH OF CONTRACT
AGAINST CHI AND FHS – LTD BENEFITS**

82. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 81, above.

1 83. In consideration for Dr. Nielsen's promised labor, FHS promised to provide
2 with him with benefits under the terms of the LTD Plan. This exchange of promises
3 constituted a contract.

4 84. The LTD Plan constituted a contract between CHI and FHS's employees
5 covered by the LTD Plan. Dr. Nielsen was covered by the LTD Plan. His labor for FHS – an
6 affiliate of CHI – constituted consideration for CHI's promise to provide benefits under the
7 terms of the LTD Plan. In addition, as the Plan Administrator under the LTD Plan, CHI owed
8 Dr. Nielsen a contractual duty to ensure that benefits were paid to him in accordance with the
9 terms of the LTD Plan.

10 85. Dr. Nielsen performed all of his obligations under the contracts with CHI and
11 FHS.

12 86. Dr. Nielsen qualified, and continues to be qualified, for LTD benefits under the
13 terms of the LTD Plan. CHI and FHS breached their contractual duties to Dr. Nielsen by
14 failing to pay Dr. Nielsen the benefits to which he was entitled under the LTD Plan, and/or by
15 failing to ensure that Unum paid Dr. Nielsen the benefits to which he was entitled under the
16 LTD Plan

17 87. Dr. Nielsen has incurred damages as a result of the breach of the contract by
18 CHI and FHS with respect to LTD benefits. Dr. Nielsen is entitled to recover from CHI and
19 FHS all the benefits to which he was and is entitled under the terms of the LTD Plan. These
20 benefits include the payment of monthly benefits of 60% of his gross monthly income just
21 prior to the initial date of his disability, adjusted for inflation. Dr. Nielsen is entitled to these
22 monthly benefits from the end of the “elimination period” (as described in the LTD Plan and
23 the LTD policy) to the date of entry of judgment in this action.

**FOURTH CAUSE OF ACTION: BREACH OF CONTRACT
AGAINST UNUM LIFE– LTD BENEFITS UNDER
THE LTD INSURANCE POLICY**

88. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 87, above.

89. Unum Life entered into an insurance contract with CHI to provide LTD benefits to employees of FHS. CHI paid the premiums. In return, Unum Life issued the LTD policy to CHI.

90. As a participant in the LTD Plan, Dr. Nielsen was a third-party beneficiary of the LTD insurance policy provided by Unum Life to CHI. Unum Life owed Dr. Nielsen a contractual duty to pay Dr. Nielsen any and all benefits to which he became entitled under the terms of the LTD policy. Dr. Nielsen performed all of his obligations under the LTD policy.

91. Dr. Nielsen qualified for LTD benefits under the terms of the LTD policy. Unum Life breached the contract and breached its contractual duty to Dr. Nielsen by refusing to pay him the benefits to which he was and is entitled under the terms of the LTD policy.

92. Dr. Nielsen has suffered damages as a result of Unum Life's breach of its contractual duties under the LTD policy. Dr. Nielsen is entitled to recover from Unum Life all the benefits to which he is entitled under the terms of the LTD Policy, as described above.

**FIFTH CAUSE OF ACTION: BREACH OF CONTRACT
AGAINST LTD PLAN**

93. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 92, above.

94. The LTD Plan is an employee welfare benefit plan established by CHI to provide LTD benefits to employees of CHI and affiliated organizations such as FHS. Dr. Nielsen was a participant in the LTD Plan.

95. In consideration of Dr. Nielsen's labor for FHS (an affiliate of CHI), the LTD Plan promised to pay benefits to Dr. Nielsen under the terms of the LTD Plan.

1 owed Dr. Nielsen a contractual duty to pay Dr. Nielsen any and all benefits to which he
2 became entitled under the terms of the LTD Plan.

3 96. Dr. Nielsen performed all of his obligations under the LTD Plan.

4 97. Dr. Nielsen qualified, and continues to be qualified, for LTD benefits under the
5 terms of the LTD Plan. The LTD Plan breached its contractual duty by failing to pay Dr.
6 Nielsen the benefits to which he was entitled under the LTD Plan, and/or by failing to ensure
7 that Unum Life paid Dr. Nielsen the benefits to which he was entitled under the LTD Plan.
8

9 98. Dr. Nielsen has incurred damages as a result of the breach of the contract by
10 the LTD Plan. Dr. Nielsen is entitled to recover from the LTD Plan all the benefits to which
11 he was and is entitled under the terms of the LTD Plan, as described above.

12 **SIXTH CAUSE OF ACTION: DECLARATORY JUDGMENT**
13 **AGAINST ALL DEFENDANTS DECLARING**
14 **ONE-YEAR LIMIT ON BENEFITS FOR DISABILITY**
15 **DUE TO MENTAL ILLNESS TO BE UNENFORCEABLE**

16 99. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 98, above.

17 100. Under both the LTD Plan and the LTD Policy, if Dr. Nielsen's disability were
18 due to an illness other than mental illness, he would be entitled to benefits until he reached
19 age 65 -- a period of 10 years since he was 55 at the time his disability began. But both the
20 LTD Plan and the LTD Policy limit the payment of benefits to a maximum of one year if the
disability is due to mental illness.

21 101. None of the defendants has paid Dr. Nielsen *any* benefits so far. Since no
22 benefits have been paid, none of the defendants has yet terminated the payment of benefits
23 based on the mental illness limitation.

24 102. But if the Court or the jury determines that Dr. Nielsen is indeed disabled
under the terms of the LTD Plan and the LTD Policy and that his disability continued more

1 than one year beyond the elimination period, defendants will likely assert that they owe Dr.
2 Nielsen no more than one year of benefits, based on the mental illness limitation.

3 103. The mental illness limitation is illegal, void, and unenforceable for one or more
4 of the following reasons:

5 a. It violates the Washington Law Against Discrimination (WLAD) (RCW ch.
6 49.60);

7 b. It violates Title III of the Americans with Disabilities Act (ADA);

8 c. It is void as against public policy;

9 d. Because such a large percentage of disabled persons are disabled due to mental
10 illness, the general promise in the LTD Plan and the LTD policy to pay benefits over a period
11 of many years is effectively an illusory promise;

12 e. Because the definition of “mental illness” in the LTD Plan and the LTD policy
13 is so broad as to make the mental illness limitation an exclusion that effectively swallows the
14 promised coverage; and

15 f. It otherwise violates the law of the United States, the State of Washington
16 (where its effects are felt in this case), and/or the State of Colorado (where the LTD policy
17 was issued to CHI).

18 104. A justiciable controversy exists between Dr. Nielsen and the defendants as to
19 whether the mental illness limitation is illegal, void, and/or unenforceable. The Court should
20 enter a judgment declaring the mental illness limitation to be illegal, void, and/or
21 unenforceable and declaring that Dr. Nielsen is entitled to LTD benefits from the end of the
22 elimination period to the date when judgment is entered, and for as long in the future (until he

1 reaches age 65) as Dr. Nielsen continues to meet the definition of “disabled” under the terms
2 of the LTD Plan and LTD policy.

3

4 **SEVENTH CAUSE OF ACTION: VIOLATION OF THE WLAD**
BY FHS

5 105. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 104, above.

6 106. On its face the WLAD exempts religious non-profit organizations from its
7 definition of “employer.” FHS is a religious non-profit organization.

8 107. In December of 2012, however, the United States District Court for the
9 Western District of Washington certified the following questions to the Washington Supreme
10 Court:

11 1. The Washington Law Against Discrimination excludes religious non-profit
12 organizations from its definition of “employer” (Wash. Rev. Code §
13 49.60.040(11)). Such entities are therefore facially exempt from the WLAD’s
14 prohibition of discrimination in the workplace. Does this exemption violate
15 Wash. Const. Article I, §11 or §12?

16 2. If not, is Wash. Rev. Code § 49.60.040(11)’s exemption unconstitutional as
17 applied to an employee claiming that the religious non-profit organization
discriminated against him for reasons wholly unrelated to any religious
purpose, practice, or activity?

18 A ruling from the Washington Supreme Court is pending.

19 108. By providing their employees with an LTD Plan and an LTD policy that
20 included the mental illness limitation described above, FHS discriminated against Dr. Nielsen
21 and other FHS employees on the basis of their mental disability. This is a reason wholly
22 unrelated to any religious purpose, practice, or activity. Thus, if the Washington Supreme
23 Court answers either of the certified questions in the affirmative, FHS is not exempt from the
24 WLAD.

1 109. The WLAD prohibits discrimination in the terms of employment (including
2 benefits) based on mental disability. By providing their employees with an LTD Plan and an
3 LTD policy that included the mental illness limitation described above (i.e., by providing
4 lesser benefits to employees with mental disabilities than to employees with physical
5 disabilities), FHS discriminated against Dr. Nielsen and other FHS employees on the basis of
6 their mental disability in violation of the WLAD.

7 110. When defendants assert that Dr. Nielsen is entitled to no more than one year of
8 LTD benefits based on the mental illness limitation, Dr. Nielsen will suffer resulting damage.

10 111. Pursuant to the WLAD, the Court should grant declaratory and injunctive
11 relief declaring the mental illness limitation to be illegal, void, and unenforceable, enjoining
12 FHS from enforcing the mental illness limitation, and ordering FHS to pay LTD benefits to
13 Dr. Nielsen from the end of the elimination period to the date when judgment is entered, and
14 for as long in the future (until he turns 65) as Dr. Nielsen continues to meet the definition of
15 “disabled” under the terms of the LTD Plan and LTD policy.

16 **EIGHTH CAUSE OF ACTION: VIOLATION OF TITLE III**
17 **OF THE ADA BY UNUM LIFE**

18 112. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 111, above.

19 113. Title III of the ADA provides that “[n]o individual shall be discriminated
20 against on the basis of disability in the full and equal enjoyment of the goods, services ... of
21 any place of public accommodation” 42 U.S.C. § 12182(a). That title provides further that
22 “[i]t shall be discriminatory to subject an individual or class of individuals on the basis of a
23 disability ... directly, or through contractual, licensing or other arrangements, to a denial of the
24 opportunity of the individual or class to participate in or benefit from the goods, services,
25 facilities, advantages or accommodations of an entity.” 42 U.S.C. § 12182(b)(1)(A)(i). In

1 addition, Title III forbids “afford[ing] an individual or class of individuals, on the basis of a
2 disability or disabilities of such individual or class, directly, or through contractual, licensing,
3 or other arrangements with the opportunity to participate in or benefit from a good, service,
4 facility, privilege, advantage or accommodation that is not equal to that afforded to other
5 individuals.” 42 U.S.C. § 12182(b)(1)(A)(ii).

6 114. Title III’s prohibition against disability discrimination applies to the substance
7 of employee benefit plans and to an insurance company’s denial of insurance coverage.
8

9 115. By offering Dr. Nielsen less coverage for his mental disability than it offered
10 to persons with physical disabilities, Unum Life denied him the “full and equal enjoyment” of
11 his benefits in violation of Title III of the ADA.

12 116. When Unum Life asserts that Dr. Nielsen is entitled to no more than one year
13 of LTD benefits based on the mental illness limitation, Dr. Nielsen will suffer resulting
14 damage.

15 117. Pursuant to Title III of the ADA, the Court should grant declaratory and
16 injunctive relief declaring the mental illness limitation to be illegal, void, and unenforceable,
17 and prohibiting Unum Life from enforcing the mental illness limitation.

18 **NINTH CAUSE OF ACTION: BREACH OF FIDUCIARY**
19 **DUTY BY UNUM LIFE AND UNUM GROUP**

20 118. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 117, above.

21 119. As the insurer and claim administrator for the LTD Plan, Unum Life and
22 Unum Group (collectively “Unum”) owed participants in the LTD Plan, including Dr.
23 Nielsen, a fiduciary duty.

1 120. Unum breached its fiduciary duty by denying benefits to Dr. Nielsen in
2 violation of the terms of the LTD Plan and LTD policy, and placing its own financial interests
3 ahead of the interests of Dr. Nielsen.

4 121. Dr. Nielsen has incurred damages as a result of this breach of fiduciary duty by
5 Unum. Dr. Nielsen is entitled to recover from Unum all the benefits to which he was and is
6 entitled under the terms of the LTD Plan and LTD policy. These benefits include the payment
7 of monthly benefits of 60% of his gross monthly income just prior to the initial date of his
8 disability, adjusted for inflation. Dr. Nielsen is entitled to these monthly benefits from the
9 end of the “elimination period” (as described in the LTD Plan and the LTD policy) to the date
10 of entry of judgment in this action.

12 122. As the Claims Administrator under the STD Program, Unum owed participants
13 in the STD Program, including Dr. Nielsen, a fiduciary duty. Although Unum was not the
14 insurer of the STD Program, it was the insurer of the LTD Plan. Unum knew that if it
15 determined that Dr. Nielsen was entitled to STD benefits, this would likely mean that Dr.
16 Nielsen would be entitled to benefits under the LTD Plan and LTD policy. Since Unum was
17 the insurer of the LTD Plan and LTD policy, Unum had a strong financial incentive to deny
18 Dr. Nielsen’s STD claim. Unum breached its fiduciary duty by denying benefits to Dr.
19 Nielsen in violation of the terms of the STD Program, and placing its own financial interests
20 ahead of the interests of Dr. Nielsen.

22 123. Dr. Nielsen incurred damages as a result of Unum’s breach of its fiduciary
23 duty with respect to the STD Program. Dr. Nielsen is entitled to recover from Unum the full
24 amount of his salary over the 90 day period that began 7 days after the date his disability
25 began (May 21, 2010).

**TENTH CAUSE OF ACTION: INSURANCE
BAD FAITH AGAINST UNUM**

124. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 123, above.

125. Washington law, including RCW 48.30.010, imposes on an insurer a duty of good faith requiring that all its actions be actuated by good faith, requiring it to abstain from deception, and requiring it to practice honesty and equity in all matters related to the business of insurance. The duty of good faith requires an insurer to conduct a reasonable investigation before refusing to pay a claim submitted by its insured. An insurer must also have a reasonable justification before refusing to pay a claim. An insurer who refuses to pay a claim, without conducting a reasonable investigation or without having a reasonable justification, fails to act in good faith.

126. As described above, Unum's denials of Dr. Nielsen's claims were unreasonable, frivolous and/or unfounded, and it failed to conduct a reasonable investigation before denying Dr. Nielsen's claims.

127. Unum's insurance bad faith proximately caused Dr. Nielsen to suffer damage, including mental anguish, suffering, emotional distress, loss of benefits, loss of peace of mind, and any other damages permitted by law in an amount to be determined at or before trial.

**ELEVENTH CAUSE OF ACTION: VIOLATION
OF CONSUMER PROTECTION ACT BY UNUM**

128. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 127, above.

129. By failing to conduct a reasonable investigation before denying Dr. Nielsen's claims and by failing to have a reasonable justification for denying those claims (all as described above). Unum committed one or more unfair or deceptive acts or practices in

1 violation of the Washington Consumer Protection Act (CPA).

2 130. These unfair or deceptive acts or practices occurred in trade or commerce.

3 131. These unfair or deceptive acts or practices impacted the public interest, since
4 the Legislature has declared that the business of insurance impacts the public interest. RCW
5 48.01.030.

6 132. Unum's unfair or deceptive acts or practices have caused injury to Dr.
7 Nielsen's business or property by depriving him of insurance benefits to which he is entitled.

8 133. The injury to Dr. Nielsen's business or property is causally linked to Unum's
9 unfair or deceptive acts or practices.

10 134. Pursuant to the CPA, Dr. Nielsen is entitled to recover from Unum his actual
11 damages, treble damages, and his reasonable attorneys' fees and costs in this action.

12
13 **TWELFTH CAUSE OF ACTION: VIOLATION**
OF INSURANCE FAIR CONDUCT ACT ("IFCA") BY UNUM

14 135. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 134, above.

15 136. Unum has violated the Washington Insurance Fair Conduct Act (IFCA), RCW
16 ch. 48.30, by, among other acts, (a) unreasonably denying claims for coverage and payment of
17 benefits, in violation of RCW 48.30.015; (b) refusing to pay claims without conducting a
18 reasonable investigation, in violation of WAC 284-30-330(4); and (c) failing to promptly
19 provide a reasonable explanation of the basis in the insurance policy in relation to the facts or
20 applicable law for denial of a claim, in violation of WAC 284-30-330(13).

21 137. Unum violated IFCA by ignoring or summarily dismissing the findings and
22 conclusions of Dr. Nielsen's treating physicians and other medical professionals who have
23 examined him that he suffers from Adult Attention Deficit Disorder, anxiety, depression, and
24 social awareness deficits, and that because of these impairments he has been continuously
25

1 unable to perform the material and substantial duties of his regular occupation since May 21,
2 2010.

3 138. Unum violated IFCA by ignoring or summarily dismissing the findings and
4 conclusions of Dr. Nielsen's treating physicians and other medical professionals who have
5 examined him that Dr. Nielsen's "Global Assessment Functioning" ("GAF") level since May
6 21, 2010 has been in the range of 45-50 on a 100-point scale. The GAF is a scale that the
7 mental health professionals use to describe the patient's overall level of psychological, social,
8 and occupational functioning. According to the "Diagnostic and Statistical Manual of Mental
9 Disorders," 4th ed., published by the American Psychiatric Association ("DSM IV"), a person
10 with a GAF rating of anywhere from 41 to 50 has "serious symptoms (e.g., suicidal ideation,
11 severe obsessional rituals, frequent shoplifting) OR any serious impairment in social,
12 occupational, or school functioning (e.g., no friends, unable to keep a job)" (emphasis added);
13

14 139. Unum violated IFCA by ignoring or summarily dismissing the findings and
15 conclusions of Dr. Nielsen's treating physicians and other medical professionals who have
16 examined him that since May 21, 2010 Dr. Nielsen has had cognitive deficits and psychiatric
17 conditions that impact his ability to function.

18 140. Unum violated IFCA by ignoring or summarily dismissing the findings and
19 conclusions of Dr. Nielsen's treating physicians and other medical professionals who have
20 examined him that since May 21, 2010 Dr. Nielsen has been limited by poor attention, poor
21 concentration, poor working memory, forgetfulness, slow processing, problems with
22 organization, problems with sequencing, and problems with follow through.

23 141. Unum violated IFCA by denying Dr. Nielsen's claims for STD and LTD
24 benefits because, in Unum's words, "you did not stop working because you were instructed to

1 do so by a medical professional.” Unum relied on the nonsensical notion that Dr. Nielsen was
2 disabled only if his physician advised him to cease work. There was no such requirement in
3 the language of the STD Program or the LTD policy. Instead, the STD Program and the LTD
4 Policy defined “disabled” simply as being unable, due to his sickness, to perform the duties
5 that were normally required for his regular occupation.

6
7 142. Unum violated IFCA by denying Dr. Nielsen’s LTD claim based on the fact
8 that Dr. Nielsen had attempted to find work as a physician. Nothing in the policy states that a
9 claimant cannot be considered disabled if he is seeking to find work in his occupation.

10
11 143. Unum violated IFCA by denying Dr. Nielsen’s LTD claim because the State
12 had taken no action against his medical license. The suggestion was that a physician is not
13 disabled as long as the State in which he or she practices has taken no action against his or her
14 medical license. There is nothing in the LTD policy’s definition of “disabled” to support this
15 position.

16
17 144. Unum violated IFCA by denying Dr. Nielsen’s LTD claim because of a
18 comment by his treating physician that Dr. Nielsen had performed well with clinical work and
19 that absent administrative duties such as time constraints and paperwork, he was able to care
20 for patients and their families in a very therapeutic fashion. The issue is not whether Dr.
21 Nielsen was a threat to the safety of patients with whom he was able to spend large amounts
22 of time, undistracted by the needs of other patients, the need to record information concerning
23 patients, phone calls, emails, other interruptions, etc. The issue was, and is, whether Dr.
24 Nielsen’s psychiatric condition rendered him unable to perform the duties normally required
25 for the performance of his regular occupation. Unum’s position would make sense only if
administrative duties, time constraints, and paperwork were not part of the duties normally

1 required of a physician in a modern medical practice. But dealing with administrative
2 responsibilities, dealing successfully with time constraints, and completing paperwork *are*
3 duties normally required of a physician in a modern medical practice. Unum cited no
4 evidence suggesting otherwise.

5

6 145. Unum violated IFCA by denying Dr. Nielsen's LTD claim because of a
7 comment by his psychotherapist that while Dr. Nielsen had limitations as a physician, he was
8 not unfit for duty as a doctor. Unum's reliance on this observation is yet another example of
9 its faulty logic and unreasonable conclusion. The premise for Unum's denial of Dr. Nielsen's
10 claim was that as long as a physician is not so cognitively or psychologically impaired as to
11 be totally unfit to act as a physician in any setting, then the physician is not disabled. But
12 again, that premise is not supported by the LTD policy's definition of "disabled." If given
13 unlimited amounts of time to spend with each patient, if not required to remember information
14 about multiple patients, if not required to complete chart notes concerning multiple patients in
15 a short time frame, if not required to respond appropriately and in a timely fashion to
16 colleagues and other staff members, if not required to remember to bring his pager to the
17 hospital, if not required to show up on time, if not required to perform other routine
18 administrative duties, and if not required to demonstrate an excellent working memory and an
19 ability to screen out distractions, a physician like Dr. Nielsen may indeed be "fit" to practice
20 medicine in the sense of appropriately diagnosing and treating an extremely limited number of
21 patients. But the ability to perform all of these duties is normally required of every physician
22 in every modern medical facility. Again, Unum cited no evidence suggesting otherwise.
23 Moreover, the same psychotherapist diagnosed Dr. Nielsen as suffering from Attention-
24 Deficit/Hyperactivity Disorder, Primarily Inattentive Type, as well as Dysthymic Disorder (an
25

1 overwhelming, chronic state of depression), acknowledged that Dr. Nielsen can become
2 flustered in situations like morning rounds that require rapid information processing, and
3 recognized that Dr. Nielsen's cognitive and psychological impairments limited his abilities as
4 a physician.

5 146. Unum violated IFCA by continuing to deny Dr. Nielsen's LTD claim based on
6 selected statements by Dr. Nielsen to some of his medical care providers in late 2011, 2012,
7 or 2013 about how he was feeling at that time. Unum carefully chose a few statements
8 indicating that Dr. Nielsen thought he was doing well and/or feeling well. Unum even sought
9 to justify its denial of the LTD appeal by seizing on alleged statements by Dr. Nielsen in late
10 2011, 2012, or 2013 to the effect that he was feeling well because of the lack of work
11 pressures and associated stress. By citing these alleged statements, Unum was suggesting that
12 Dr. Nielsen was suddenly "cured" and therefore was fully able to obtain and maintain
13 employment as a physician. These statements in no way establish that Dr. Nielsen had
14 suddenly become capable of consistently demonstrating the high degree of focus,
15 concentration, rapid mental processing, attention, organization, working memory, sequencing,
16 and social perceptiveness necessary to obtain and hold a job as a physician. In addition, these
17 statements made in late 2011, 2012 and 2013 have no bearing on the question of whether he
18 was disabled in 2010 and most of 2011. Moreover, at the time that Unum continued to deny
19 the LTD claim, Unum knew that the very nature of at least one of Dr. Nielsen's illnesses
20 deprived him of the ability to understand and measure his own feelings and level of cognitive
21 performance. As one of Dr. Nielsen's treating physicians told Unum, Dr. Nielsen has poor
22 insight into his problems with employers and into his interactions with others, and he
23 typically thinks he is doing fine when in fact he is not. Thus, it was both incorrect and
24

unreasonable for Unum to conclude, based on Dr. Nielsen's own reports in late 2011, 2012 and 2013 about how he was feeling or doing, that Dr. Nielsen was capable of obtaining and maintaining employment as a physician.

147. Dr. Nielsen suffered damages as a proximate result of Unum's violation of
IFCA.

148. Dr. Nielsen complied with RCW 48.30.015(8) by giving Unum and the Washington Insurance Commissioner notice of the basis for his IFCA claim more than twenty days before filing this Amended Complaint. Unum has not changed its position and has not resolved the basis for Dr. Nielsen's IFCA claim.

**THIRTEENTH CAUSE OF ACTION: AS AGAINST
UNUM, CHI, AND THE LTD PLAN -- WRONGFUL DENIAL
OF BENEFITS, BREACH OF FIDUCIARY DUTY,
AND EQUITABLE RELIEF UNDER ERISA**

149. Dr. Nielsen re-alleges, as if restated herein, paragraphs 1 through 148, above.

150. ERISA does not apply to the LTD Plan, the LTD Policy, the STD Program, or to this case because the LTD Plan and the STD Program are both “church plans,” and because CHI did not properly elect to have either the LTD Plan or the STD Program treated as being subject to ERISA. In addition, Unum, the LTD Plan, and CHI have admitted that Dr. Nielsen’s claims are not governed by ERISA.

151. In the alternative, however, if this Court determines that ERISA applies to this action and that it preempts any of Dr. Nielsen's claims, Dr. Nielsen asserts the following cause of action based on ERISA.

152. For the reasons set forth in detail above, Dr. Nielsen is entitled to STD and LTD benefits. Pursuant to 29 USC § 1132, Dr. Nielsen is entitled to recover these benefits from Unum, CHI, and the LTD Plan.

1 153. A regulation issued by the Washington Insurance Commissioner prohibits
2 discretionary clauses in disability policies. This regulation declares in pertinent part:

3 (1) No disability insurance policy may contain a discretionary clause.
4 “Discretionary clause“ means a provision that purports to reserve discretion to
5 an insurer, its agents, officers, employees, or designees in interpreting the
6 terms of a policy or deciding eligibility for benefits, or requires deference to
7 such interpretations or decisions . . .

8 WAC 284.96.012.

9 154. The LTD policy was issued to CHI in Colorado. Under Colorado law,

10 (2) An insurance policy, insurance contract, or plan that is issued in this state
11 that offers health or disability benefits shall not contain a provision purporting
12 to reserve discretion to the insurer, plan administrator, or claim administrator
13 to interpret the terms of the policy, contract, or plan or to determine eligibility
14 for benefits.

15 (3) An insurance policy, insurance contract, or plan that is issued in this state
16 shall provide that a person who claims health, life, or disability benefits, whose
17 claim has been denied in whole or in part, and who has exhausted his or her
18 administrative remedies shall be entitled to have his or her claim reviewed de
19 novo in any court with jurisdiction and to a trial by jury.

20 Colorado Revised Statutes (“CRS”) § 10-3-1116.

21 155. State statutes or regulations like WAC 284.96.012 and CRS § 10-3-1116,
22 which prohibit discretionary clauses, are not preempted by ERISA. *Standard Insurance Co.*
23 *v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

24 156. In particular, neither WAC 284.96.012 nor CRS § 10-3-1116 is preempted by
25 ERISA. *Landree v. Prudential Ins. Co. of America*, 833 F.Supp.2d 1266 (W.D.Wash., 2011);
citing No. C10-484 RSL, *Murray v. Kane*, 2011 WL 617384 at *5 (W.D.Wash, Feb. 10,
2011); *McClenahan v. Metropolitan Life Ins. Co.*, 621 F.Supp.2d 1135 (D.Colo. 2009). The
provisions in the LTD policy purporting to grant Unum discretion to determine benefits
constitute a violation of WAC 284.96.012 and CRS § 10-3-1116. Accordingly, those
provisions are invalid and have no effect. Because the LTD policy contains no legally

1 effective clause conferring discretion on Unum, this court must apply a *de novo* standard of
2 review concerning Unum’s decisions.

3 157. Even if an abuse of discretion standard applies, Dr. Nielsen is entitled to
4 benefits. Under the abuse of discretion standard, a plan administrator’s decision will not be
5 disturbed if reasonable. *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917, 929 (9th Cir.
6 2012). This reasonableness standard requires deference to the administrator’s benefits
7 decision unless it is (1) illogical, (2) implausible, or (3) without support in inferences that may
8 be drawn from the facts in the record. *Id.*

9 158. The degree of skepticism with which the court regards the insurer or
10 administrator’s decision when determining whether there was an abuse of discretion varies
11 based upon the extent to which the decision appears to have been affected by a conflict of
12 interest. *Id.*

13 159. Since Unum both determines disability benefits and pays for them, it has a
14 direct financial incentive to deny claims. Unum’s dual role as the entity that decides whether
15 the claimant is entitled to benefits and if so the amount and duration, and its role as insurer,
16 responsible for paying such benefits, creates a structural conflict of interest. *Id.* The weight
17 to be accorded to a conflict of interest depends upon the likelihood that the conflict impacted
18 Unum’s decision making. *Id.*

19 160. Where circumstances suggest a higher likelihood that the conflict affected the
20 benefits decision, the conflict should prove more important (perhaps of great importance).
21 *Metropolitan Life Ins. Co. v. Glenn* , 554 U.S. 105, 117, 128 S.Ct. 2343 (2008); *Stephan*, 697
22 F.3d at 929.

23 161. The Supreme Court instructed in *Glenn* that a “conflict of interest ... should
24 prove more important (perhaps of great importance) ... where an insurance company
25 administrator has a history of biased claims administration.” *Glenn*, 554 U.S. at 117. In so

1 stating, *Glenn* cited a law review article “detailing such a history for one large insurer.” *Id.*
2 (citing John H. Langbein, Trust Law as Regulatory Law: The Unum/Provident Scandal and
3 Judicial Review of Benefit Denials Under ERISA, 101 Nw. U.L.Rev. 1315, 1317–21 (2007)).
4 That insurer was Unum. *Id.*

5 162. Numerous courts, including the 9th Circuit, have commented on Unum’s
6 history ““of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and
7 other unscrupulous tactics,”” *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 137 (2d
8 Cir.2008) (quoting *Radford Trust v. First Unum Life Ins. Co.*, 321 F.Supp.2d 226, 247
9 (D.Mass.2004), rev’d on other grounds, *934 491 F.3d 21, 25 (1st Cir.2007)). In *Saffon v.*
10 *Wells Fargo & Co. LTD Plan*, 522 F.3d 863, 867, the court referred to “the cupidity of one
11 particular insurer, Unum–Provident Corp., which boosted its profits by repeatedly denying
12 benefits claims it knew to be valid. Unum–Provident’s internal memos revealed that the
13 company’s senior officers relied on ERISA’s deferential standard of review to avoid detection
14 and liability.” See also *Radford Trust*, 321 F.Supp.2d at 247 n. 20 (collecting cases).

15 163. This Court must regard Unum’s decision with a high degree of skepticism.

16 164. As the facts recited in detail above demonstrate, Unum, CHI, and the LTD
17 Plan abused whatever discretion they were entitled to exercise in denying Dr. Nielsen’s
18 claims.

19 165. The Court should order Unum, CHI, and the LTD Plan to pay benefits to Dr.
20 Nielsen under the LTD Plan, the LTD Policy, and the STD Program from May 21, 2010
21 through the time at which judgment is entered, plus pre-judgment and post-judgment interest,
22 and plaintiff’s actual attorneys’ fees and costs pursuant to 29 U.S.C. § 1132(g)(1).

23 166. For the reasons set forth in detail above, Dr. Nielsen is entitled under 29 USC §
24 1132 to an Order from this Court clarifying his rights under the LTD Plan, declaring that the
25 provision in the LTD Plan and LTD Policy limiting benefits for a mental disability to one year

1 is void and unenforceable, declaring that Dr. Nielsen is entitled to all benefits to the same
2 extent as a participant or beneficiary whose disability is caused by a physical injury or illness,
3 and to equitable relief requiring Unum, CHI, and the LTD Plan to pay benefits to Dr. Nielsen
4 the same extent as a participant or beneficiary whose disability is caused by a physical injury
5 or illness.

6 167. For the reasons set forth in detail above, Dr. Nielsen is entitled under 29 USC §
7 1132 to an Order from this Court clarifying his rights under the LTD Plan, and declaring that
8 Dr. Nielsen will remain disabled, as that term is defined in the LTD Plan and the LTD Policy,
9 for the rest of his life. Dr. Nielsen is also entitled to equitable relief requiring Unum, CHI,
10 and the LTD Plan to pay benefits to Dr. Nielsen from the time of entry of judgment until he
11 reaches age 65.

12 168. CHI is the designated Plan Administrator of the LTD Plan and the Program
13 Administrator for the STD Plan. It has failed to discharge its duties in violation of 29 U.S.C.
14 §§ 1104, 1132, 1133, and 1140. Dr. Nielsen is therefore entitled to relief authorized by 29
15 U.S.C. § 1132 against the Plan Administrator.

16 169. At all relevant times, Unum and CHI were fiduciaries with respect to the
17 exercise of authority over the management and administration of the LTD Plan and the STD
18 Program, and the disposition of assets thereof.

19 170. Unum and CHI breached their fiduciary duty by not acting solely in the interest
20 of the Plan/Program participants and beneficiaries, by not acting in accordance with the
21 Plan/Program documents, by failing to use all prudent care, skill, prudence and diligence of a
22 prudent person in like circumstances, by failing to properly evaluate Dr. Nielsen's claim, and
23 by placing their own financial interests ahead of those of Dr. Nielsen.

24 171. In the alternative, in the event the Court determines based on the existing
25 administrative record that Dr. Nielsen is not entitled to STD or LTD benefits to the full extent

1 described above, the Court should reopen the administrative record in this case in order to
2 consider additional evidence, including the determination by the U.S. Social Security
3 Administration that under its rules Dr. Nielsen has been continuously disabled since May 28,
4 2010.

5 172. On at least two occasions, June 19, 2013 and August 5, 2013, Dr. Nielsen
6 (through his attorney) wrote to CHI asking for documents and information that CHI, as Plan
7 Administrator, was obligated to provide to him. CHI never responded to either of these
8 written requests. Pursuant to 29 USC § 1132(c)(1), CHI is liable to Dr. Nielsen in the amount
9 of \$100/day for its failure to provide the requested documents and information.

10 **JURY DEMAND PURSUANT TO FED.R.CIV.P. 38(b)**

11 Plaintiff hereby requests that any and all aspects of this suit be tried before a jury
12 pursuant to Fed.R.Civ.P. 38(b), subject to the further order of this Court.
13

14 **PRAYER FOR RELIEF**

15 WHEREFORE, having stated his causes of action against defendants, Dr. Nielsen
16 prays for the following relief:

17 1. For benefits under the STD Program, including the full amount of his salary
18 over the 90 day period that began 7 days after the date his disability began (May 21, 2010).

19 2. For all benefits to which he is entitled under the LTD Plan and LTD policy.
20 These benefits include the payment of monthly benefits of 60% of his gross monthly income
21 just prior to the initial date of his disability, adjusted for inflation. Dr. Nielsen is entitled to
22 these monthly benefits from the end of the “elimination period” (as described in the LTD Plan
23 and the LTD policy) to the date of entry of judgment in this action.

24 3. For extra-contractual damages including mental anguish, suffering, emotional
25 distress, loss of peace of mind, and any other damages permitted by law.

1 4. For treble damages under the CPA and IFCA.

2 5. For judgment declaring the mental illness limitation in the LTD Plan and LTD
3 policy to be illegal, void, and unenforceable.

4 6. For injunctive relief prohibiting any of the defendants from enforcing the
5 mental illness limitation in the LTD Plan and LTD policy.

6 7. For injunctive and declaratory relief requiring Unum, CHI, and the LTD Plan
7 to pay benefits to Dr. Nielsen the same extent as a participant or beneficiary whose disability
8 is caused by a physical injury or illness.

9 8. For judgment declaring that Dr. Nielsen will remain “disabled” under the terms
10 of the LTD Plan and LTD policy for the rest of his life and requiring Unum, CHI, and the
11 LTD Plan to pay LTD benefits to Dr. Nielsen from the time at which judgment is entered in
12 this case until he reaches age 65.

13 9. For an order reopening the Administrative Record in this case to accept
14 additional proof of Dr. Nielsen’s disability, including but not limited to the determination by
15 the U.S. Social Security Administration that under its rules Dr. Nielsen has been continuously
16 disabled since May 28, 2010.

17 10. For an order authorizing Dr. Nielsen to obtain discovery in this cause related to
18 the extent to which Unum has a conflict of interest by being both administrator and payor of
19 claims, and the likelihood that the conflict impacted Unum’s decision making.

20 11. For prejudgment interest with respect to unpaid benefits through the time at
21 which judgment for benefits is entered in favor of Dr. Nielsen.

22 12. For judgment that CHI is liable to Dr. Nielsen in the amount of \$100/day for
23 its failure to provide requested documents and information under 29 USC § 1132(c)(1).

13. For attorneys' fees and costs (including expert witness fees) incurred in this action pursuant to the CPA, the WLAD, Title III of the ADA, IFCA, common law, Olympic Steamship Company v. Centennial Insurance Company, 117 Wash.2d 37, 811 P.2d 637 (1991), 29 U.S.C. § 1132, or any other applicable legal or equitable principles.

14. For such other and further relief as the Court deems just and equitable.

Dated this 21st day of October, 2013.

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